Ferryman Enterprises d/b/a Quality Hotel Tacoma Dome *and* Hotel Employees and Restaurant Employees, Local 8, Hotel Employees and Restaurant Employees International Union, AFL–CIO *and* HERE Health and Welfare Trust Fund.[1] Cases 19–CA–21491, 19–CA–21747, and 19–CA–22298

July 28, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On October 14, 1993, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel and Charging Party HERE Health and Welfare Trust Fund filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ferryman Enterprises d/b/a Quality Hotel Tacoma Dome, Tacoma, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The name of this Charging Party was amended at the hearing.

[2] The Respondent does not except to, and we affirm, the judge's finding that it committed postsettlement violations of Sec. 8(a)(5) and (1) by unilaterally instituting new terms and conditions of employment involving ''at will'' employment, problem review, no-solicitation, visitation, cash and charge, vacation, and leaves of absence.

[3] The General Counsel and Charging Party Trust Fund correctly note in their exceptions that the judge erroneously stated that the Federal district court decision and the arbitration decision involving the issues encompassed by Case 19–CA–21491 were rendered prior to the September 6, 1991 settlement agreement in Case 19–CA–21578. Both decisions issued after the settlement agreement: the Federal district court decision on May 26, 1992, and the arbitrator's decision on June 15, 1992. Contrary to the contentions of both parties, however, we do not find that the judge's error in this regard affects his decision that, under *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978), the settlement agreement precludes the General Counsel from litigating the presettlement conduct alleged in the charges in Cases 19–CA–21491 and 19–CA–21747.

Daniel Sanders, Esq., for the General Counsel.
Judd Lees, Esq. (Williams, Kastner & Gibbs), of Bellevue, Washington, for the Respondent.
Mel Kang, Esq. (Ekman & Bohrer), of Seattle, Washington, for Charging Party HERE Health and Welfare Trust.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in Case 19–CA–21491 was filed by Hotel Employees and Restaurant Employees, Local 8, Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union) on May 7, 1991, and the unfair labor practice charges in Cases 19–CA–21747 and 19–CA–22298 were filed on October 16, 1991, and September 23, 1992, respectively, by HERE Health and Welfare Trust (the Trust Fund).[1] Based on the unfair labor practice charges, on October 29, 1992, the Regional Director of Region 19 of the National Labor Relations Board (the Board) issued a second consolidated complaint alleging that Ferryman Enterprises d/b/a Quality Hotel Tacoma Dome (Respondent) engaged in acts and conduct violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer denying the commission of any of the alleged unfair labor practices. Based on a notice of hearing, a trial before me was held in Seattle, Washington, on January 5 and 6, 1993. At the hearing,[2] all parties were afforded the opportunity to examine and to cross-examine witnesses, to offer into the record any relevant documentary evidence, to argue their legal positions orally, and to file posthearing briefs. All parties filed the latter documents, and each brief has been carefully considered by me.[3] Accordingly, based on the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a State of Washington corporation, with an office and place of business in Tacoma, Washington, and is engaged in the business of operating a hotel and restaurant facility. In the normal course and conduct of its business operations, during the 12-month period immediately preceding the issuance of the instant second consolidated complaint, which period is representative, Respondent derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000, directly from sources outside the State of Washington or from suppliers inside the State of Washington, who had received the goods and materials from outside the State. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The name of the Trust Fund appears as amended at the hearing.

[2] Prior to the commencement of the hearing, counsel for the Trust Fund filed a motion for collateral estoppel; counsel for Respondent filed an opposition and an accompanying Motion for Summary Judgment; and counsel for the General Counsel filed an opposition to both motions. At the trial, both pretrial motions were taken under advisement by me, with rulings deferred until the issuance of this decision.

[3] Accompanying Respondent's posthearing brief was a motion to supplement the aforementioned Motion for Summary Judgment with two affidavits of Joseph Brunetti. Brunetti testified at the hearing, and there is no claim of newly discovered or previously unavailable evidence. Accordingly, this motion is denied.

II. LABOR ORGANIZATION

Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

The second consolidated complaint and the General Counsel allege that Respondent and the Union were parties to a collective-bargaining agreement, covering certain of Respondent's service and restaurant employees, which was effective until January 31, 1990; that, while extending their agreement on a day-to-day basis, the parties engaged in bargaining for a successor contract; that, in the midst of the negotiations, without notice to or bargaining with the Union, Respondent engaged in certain unilateral changes, including, since August 1990, the cessation of payments to the Trust Fund for the coverage of new bargaining unit employees, who had not completed a ''review period'' of 5 months, under the contractual health insurance plan; since January 1991, the institution of a new health plan for new bargaining unit employees; and, in March 1991, changing the method of compensating housekeepers for substantial makeovers; and that, as a result of the unlawful unilateral changes in the terms and conditions of employment of bargaining unit employees, Respondent engaged in bad-faith bargaining, thereby precluding a genuine impasse in the bargaining in or about June 1991. Further, it is alleged that, in the absence of a valid impasse, Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally, without bargaining with the Union, in June 1991, substituting a new health insurance plan for all bargaining unit employees and, in June 1992, implementing the terms and conditions of employment contained in a new employee handbook. Respondent denies the commission of any of the alleged unilateral changes, contending that any changes instituted during the bargaining were contractually mandated and that a valid impasse in bargaining was declared by the Union in June 1991, rendering lawful any changes in employees' terms and conditions of employment subsequent to that date. Finally, with regard to the employee handbook allegations, Respondent asserts that its provisions were never implemented.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent, which owns and operates four other hotels in the States of Oregon and Washington, owns and operates the Quality Hotel Tacoma Dome, a 160-unit full service hotel and restaurant facility located in Tacoma, Washington (the Hotel). The record establishes that the previous owner of the Hotel recognized the Union as the collective-bargaining representative of its food and beverage employees, kitchen employees, and hotel service employees and embodied such recognition in successive collective-bargaining agreements, commencing in June 1988, with the most recent of which effective from August 1, 1989, until January 31, 1990, and that, having purchased the Hotel in December 1989, Respondent agreed to continue to recognize the Union as the bargaining representative of the above-described employees and to abide by the terms of the existing collective-bargaining agreement, including the housekeeping bonus pay provision, article XVIII,[4] and the health insurance clause, article XIX.[5] The record further discloses that, as the existing contract was due to expire, Respondent and the Union agreed to negotiate over the terms of a successor collective-bargaining agreement and that they agreed to extend the terms and conditions of the existing contract on a day-to-day basis during the ensuing negotiations.

There is no dispute that, commencing in March 1990 and culminating on June 13, 1991, the contract negotiations, between Respondent and the Union, continued for 16 months, during which time the parties met and bargained on, at least, 8 occasions.[6] Central to the unfair labor practice allegations of the second consolidated complaint were discussions regarding the aforementioned housekeeping article and contentious bargaining over health insurance, which appears to have been the single most significant impediment to agreement during the negotiations. With regard to the latter matter, in order to place the bargaining, over it, in context, certain points must be understood. Initially, while the health insurance article of the existing collective-bargaining agreement does not mandate that the employer cover bargaining unit

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[4] This provision reads as follows:

18.01 No room attendant shall be required to do a substantial makeover of more than sixteen (16) rooms with private bath in any one shift of eight (8) hours without extra compensation. Each room of a suite shall be counted separately for this purpose. Room attendants shall be paid an additional fifty cents ($.50) for each bed, crib, or cot made up over this limit, and independently shall be paid at the overtime rate if required . . . above.

Joseph Brunetti, the general manager of the Hotel since June 1, 1991, defined the term ''substantial makeover'' as cleaning a room and changing the bedding, whether used or not.

[5] This provision, in relevant part, reads as follows:

19.01 The Employer shall provide health and dental insurance for eligible employees who have completed the review period. Brochures shall be made available to the employees and the Union through the Human Resources Department.

19.02 Contributions required For employees covered by the Restaurant Employees Welfare Fund, the employer shall pay the appropriate amount specified below each month for each employee who works sixty-five (65) hours or more during each month to the Restaurant Employees, Bartenders, and Hotel Service Employee Welfare Fund. In addition each employee who has authorized withholding and has not elected to revoke employee contributions . . . shall pay the appropriate amount . . . to be added to the Employer payment. . .

19.05 Administration The Welfare Fund shall be administered by a ten (10) member Board of Trustees (five (5) representing the Employers and five (5) representing the Union) in accordance with the terms and provisions of that certain Trust Agreement creating the Welfare Fund. . . . Except as otherwise provided . . . the employer and the Union hereby agree to be bound by the terms and provisions of said Trust agreement and amendments. . . .

19.07 Trustees' Authority Except as otherwise provided in 19.01 through 19.04 herein, the Board of Trustees shall provide hospital, medical, dental, vision, and such other health care . . . benefits as feasible. . . . The determination of . . . the eligibility of employees for such benefits shall rest exclusively with the Trustees.

[6] The parties stipulated that bargaining sessions were held on March 7, April 24, July 20, August 28, and November 1, 1990. In addition, the record establishes that negotiating sessions were held on a day in March, on May 13, and June 13, 1991.

employees under the health insurance plan, which is administered by the trustees of the Trust Fund, at the time Respondent purchased the Hotel and assumed the existing collective-bargaining agreement, all bargaining unit employees were covered under that health plan, and Respondent continued to enroll new employees only in the Trust Fund's health insurance plan. Further, notwithstanding the terms of the ''benefit plan instrument,'' which provide that new employees are initially eligible for coverage only after having worked a certain amount of time, which, on October 17, 1989, the Trust Fund's board of trustees changed from 3 to 5 ''consecutive months in which [the employee works] 65 or more hours,'' the Trust Fund requirement and the industry practice, to which, apparently, the former owner of the Hotel adhered and, there is no dispute, to which Respondent initially adhered, was that employers of covered employees reported and made ''the required contribution'' for new employees commencing in the initial month following their hire.[7]

There in no real dispute as to the initial course of bargaining over health insurance. Thus, both Glen Grover, a business agent and the chief spokesperson for the Union during bargaining through March 1991, and Attorney Herbert Gellman, who represented Respondent during the contract negotiations, testified that, at the first two bargaining sessions, the health insurance discussions concerned the proposed premium payments under the Trust Fund's plan. In this regard, the existing agreement provided that, for the $102.50 monthly premium for each covered employee, the employee would be responsible for $5 and Respondent would be responsible for the remainder ($97.50). The Union's initial contract proposal to Respondent retained the aforementioned monthly premium payment contributions for 1990, but for 1991, in order to fund a $125 premium, sought a $120 contribution from Respondent while continuing the $5 employee contribution. Respondent's response was that it wanted the ''insurance payment shared 50/50 between employer/employee.'' According to Gellman, as there was a 5-month health insurance eligibility period during which employees had no coverage and as there was high employee turnover resulting in some employees never receiving health insurance coverage despite Respondent being responsible for making almost the entire premium payment on them, Respondent's initial position was that the employees must pay a higher portion of the monthly premium, with such ultimately reaching a 50/50 split. Gellman added that Respondent was willing to increase its premium responsibility but only if the initial eligibility period was reduced ''where we're paying for nothing.'' Reflective of the bargaining over health insurance during the initial months is the fact that, at the April 24 session, discussions concerned a proposed $25 cap on the employee monthly premium payment.

Commencing with the July 20, 1990 bargaining session, the direction of the health insurance discussions abruptly changed. According to Glen Grover, echoing Gellman's above testimony, at that bargaining session, Stan Phillips, Respondent's hotel manager at the time, said that Respondent did not want to ''establish eligibility'' for new employees, who might not be employed long enough to receive the existing health insurance plan's benefits, and either at that meeting or the August 28, 1990 meeting, Respondent proposed that the Union permit it to submit an alternative health insurance plan to the bargaining unit employees as an option and stated that it would commission an insurance broker to present one to the employees. With regard to this new plan, Glen Grover testified that, subsequent to that July bargaining session, all he received were ''generalizations'' with the ''only specific thing'' being that a new plan would be developed. Then, 5 months later, at the parties' November 1, 1990 bargaining session, Respondent presented its proposed alternative health insurance plan, the Pierce County medical plan, to the Union's negotiators. While there exists no testimony on the point, based on a letter, dated December 20, from Grover to Gellman, it appears that, also on November 1, the Union made a counterproposal, removal of the 5-month eligibility period from the Trust Fund's health insurance plan in exchange for Respondent's agreement to be responsible for each employee's entire monthly premium to the Trust Fund. There is no evidence of any specific response; however, given the parties' subsequent conduct, the counterproposal was obviously rejected.

Commencing in August 1990 and continuing through June 1991, with the existing collective-bargaining agreement, including the health insurance provision, having been extended on a day-to-day basis during the ongoing successor contract negotiations, Respondent ceased making monthly health insurance premium payments for new bargaining unit employees to the Trust Fund. According to Gene Ferryman, the sole owner of the Hotel, in August 1990, inasmuch as Respondent believed the existing plan was not adequate and had decided to offer an optional health insurance plan to the bargaining unit employees ''as soon as we could get it okayed by the Union,'' after consulting with his accountant, Scott Winter, he decided that Respondent would no longer make contributions for new employees to the Trust Fund. There is no dispute that the implementation of Respondent's decision was accomplished without notice to the Union or affording it an opportunity to bargain. Justifying Respondent's conduct, Ferryman testified that he and Winter reviewed the language of article XIX of the existing agreement and concluded that section 19.01 permitted Respondent to offer an optional plan to the bargaining unit employees and that section 19.02 meant that premium payments for new employees commence when they are ''covered'' by the health insurance plan and that new employees were not ''covered'' until the passing of the 5-month initial eligibility period.[8]

Besides withholding premium payments for new hires from the Trust Fund, in a letter dated December 6, 1991, from Attorney Gellman to Glen Grover, the former announced that ''management wishes to advise you that for new hires effective January 1, 1991 they will be enrolled in the new [health insurance] plan with effective coverage to take place ninety (90) days after hire.'' Glen Grover testified that this had never been discussed during negotiations and

[7] The increase in the initial eligibility period, during which employers would make contributions for the employee, was designed to alleviate a projected need for a substantial contribution increase and a reduction in the Trust Fund reserves.

[8] Ferryman insisted that Respondent would begin making payments to the Trust Fund for any new employees after the initial eligibility period; however, there is no record that such was ever done. On this point, Ferryman testified that he and Winter interpreted the initial eligibility period as including the contractual probationary period of 3 months.

that, after reading the letter, he telephoned Gellman and ''reminded him that the only thing we were in agreement on was a plan to have them present . . . coverage . . . to the employees, and then the employees would then choose what they wanted.'' According to Grover, Gellman said ''that was his understanding as well.'' Nevertheless, the record discloses that Gellman's above-quoted statement, in fact, represented Respondent's practice, for new hires, subsequent to January 1, 1991. Thus, in response to counsel for the General Counsel's question regarding what health insurance plan was offered to new employees after January 1, 1991, Respondent's accountant, Winter, replied, ''Pierce County Medical.'' Asked if that was the only health insurance plan offered to new employees, Winter said, ''As far as I know.'' Finally, when asked whether new employees would have had no health insurance coverage if they had not chosen the Pierce County Medical Plan, Winter responded ''yeah. That's as far as I know.''[9] Glen Grover testified that he had no knowledge that Respondent was enrolling new employees in the Pierce County medical plan and that, after his above-described telephone conversation with Gellman, he heard nothing more about implementation of the Pierce County medical plan for any bargaining unit employees until some time after January 1 at which time some of the employees informed him that Respondent had posted a notice, ''indicating to them that they all were required to enroll in a new health care plan.'' Grover immediately telephoned the Hotel's new general manager, Steve Tandy, and told him ''that the posting of the new health . . . plan was completely against the grain of our negotiation process'' and, thereafter, filed an unfair labor practice charge with the Board regarding Respondent's conduct.

The parties did not have another scheduled contract bargaining session until a meeting in March 1991 in a conference room at the Hotel.[10] According to Glen Grover, Gellman and Tandy ''assured us that it was a misunderstanding on the part of the employees in our bargaining unit; that the plan was for management employees only; that it would have no effect on our previously discussed plan.'' Thereupon, the parties agreed on a date in early April at which management would present a health insurance plan to the bargaining unit employees and at which an insurance broker and a Trust Fund representative would discuss how Respondent's plan impacted on the employees. Rick Hall's account of this meeting corroborated that of Grover. According to him, Gellman and Tandy both said that the bulletin board notice had been a ''mistake'' and that management only was being offered the Pierce County medical plan. Further, the parties agreed that a meeting of bargaining unit employees should be scheduled at which time an insurance broker and a Trust Fund representative would discuss the Pierce County Plan and that ''then we would have a vote and let the employees decide which [plan they] wanted.''[11] As a result of what was said, Grover withdrew the unfair labor practice charge.

The bargaining unit employees' meeting, at which the Pierce County medical plan would be presented and commented upon by Respondent's insurance representative and a representative of the Trust Fund, was scheduled for a day in April 1991. Rick Hall testified that, shortly before the day of the meeting, he received a telephone call from a Trust Fund official, who informed Hall that there had been ''a substantial drop off of members in the plan'' for Respondent and that his information was that Respondent did not believe it had to pay for the initial 8 months of employment for new hires. Hall attended the bargaining unit employees' meeting, which progressed according to the agreed-on procedure, and requested that Steve Tandy meet with him privately. Tandy agreed, and they spoke alone on an upper floor of the Hotel. According to Hall, who was uncontroverted, he began by asking Tandy where Respondent had conjured the 8 months eligibility period. Tandy replied that such came from Respondent's interpretation of the contract, which did not require membership in the Union for the initial 3 months of employment, and the health insurance plan's 5-month initial eligibility period. Hall replied that ''people have to join the Union after 30 days''; that ''being a member of the Union or not has nothing to do with your obligation to make contributions to [the] plan . . . from day one''; and that Tandy did not have the authority ''to go ahead and all by himself decide that he's interpreting the contract this way.'' Hall added that Respondent was ''digging a hole'' with the Trust Fund and had to correct the matter, but Tandy refused to do so. The record reveals that, subsequently, Hall spoke to Trust Fund representatives and requested an audit of Respondent's records and conducted a meeting of bargaining unit employees, at which all voted to retain the Trust Fund health insurance plan.

At this point, turning to the allegations involving the housekeeping provision of the existing collective-bargaining agreement, article XVIII, I note that this does not appear to have been a significant issue during negotiations and that the crux of the matter concerns the point at which housekeepers must be paid the additional 50 cents per bed. In this regard, there is no dispute that the Hotel's prior owner paid the above bonus to housekeepers for each additional bed changed in excess of 16 beds and that Respondent continued this practice until some time in March 1991. During the course of the bargaining, the Union initially proposed to increase the bonus to $1.25 per bed, but, eventually, proposed no change from the existing amount. Respondent's consistent position was that no housekeeping bonus should be paid. Moreover, Respondent's representatives continually stated that they interpreted the contractual housekeeping provision as requiring the payment of the bonus after 16 rooms rather than 16 beds; according to Glen Grover, ''at some meeting, Herb Gellman pointed out to me that they were actually paying for beds when the contract was written in terms of

[9] Gene Ferryman testified that, in fact, after January 1, 1991, new employees were given a choice of coverage under the Trust Fund's health insurance plan or the Pierce County medical plan. Thereafter, he was confronted with prior sworn deposition testimony in which he had stated that, after January 1, new employees were only offered coverage under the latter plan. Explaining this contradiction, Ferryman averred that ''shortly after the testimony,'' he realized that his statement had been ''an error''; however, he admitted never having revealed this mistake to anyone.

[10] Present for Respondent were Gellman, Tandy, and department managers, and present for the Union were Grover, Rick Hall, who was the Union's managing director, and others.

[11] Hall stated that ''it was not our understanding that the employees would have individual option . . . the entire bargaining unit got the plan, or the entire bargaining unit got the other plan.''

rooms.'' Thereafter, Grover added, ''Phillips and . . . Gellman, and I agreed . . . to continue with [the existing but] erroneous practice [which] had been going on . . . until we reached agreement on the new contract.'' During cross-examination, Grover admitted acknowledging to Gellman that the bonus payment should have been after 16 rooms, and not 16 beds, and conceded that ''once a contract was ratified, they were going live up to this language as it was written in here.'' He added that Respondent was ''paying more money to the employees than they should have.'' Finally, Grover conceded that, in his December 6 letter, Gellman accurately described their discussions—''We discussed allowing [Article XVIII] to remain in full force and effect while we are negotiating, however it would be terminated under the new contract. The union members have already received the benefit of . . . a misapplication of that provision. . . . In its place, a premium will be included . . . that provides a relationship to rooms only and not beds.'' Notwithstanding its attorney's commitment to continue the status quo through the negotiations, without giving notice to the Union or affording it an opportunity to bargain, in March 1991, Respondent distributed, to all housekeeping personnel, a memorandum, clarifying its policy on the payment of ''extra bed credits'' pursuant to article XVIII and stating that, ''according to the contract, you are entitled to extra compensation only after sixteen rooms have been completed and all beds within those sixteen (16) rooms have been made, with the exception of *substantial* makeovers.'' Finally, according to the accountant Winter, in the latter part of March, Respondent commenced paying the housekeeping bonus in accord with its announced change from past practice,[12] and the record reveals that the Union only became aware of Respondent's above-described changed practice from the complaints of bargaining unit employees.

Thereafter, against the above-described backdrop of suspected unilateral changes by Respondent, involving withholding the payment of health insurance premiums and changing the method of paying the housekeeping bonus, the next contract bargaining session was held on May 13, 1991, in the Hotel's conference room. According to Rick Hall, who was the Union's main spokesperson, the first matter discussed was the housekeeping bonus. Hall accused Respondent of changing its practice, and, after Respondent argued that it was merely following the contract, ''I said you're right . . . but this is clearly the past practice here that you've been paying on these double beds, and that not only was [Respondent] paying on the double beds . . . but the predecessor . . . had paid in that exact same manner.'' Steve Tandy responded that it was not ''fair,'' that Respondent interpreted the contract as permitting the change. He continued, saying such was important to Respondent as it was remodeling most of its rooms, utilizing double beds rather than two single beds in each room, and that ''they didn't want to pay on the extra bed. It was a substantial amount of money for the Employer.'' With this matter unresolved, Hall testified, the negotiations then turned to health insurance, with one aspect of the discussions being the meaning section 19.02 of the existing contract—''we talked about Mr. Tandy's revelation in regards to the eight month period in which he did not have to pay on employees. [Tandy] . . . referred to a 90 day period they didn't have to join the Union, and that if they didn't have to join the Union . . . during the review period, [Respondent] didn't have to pay the contribution.'' Tandy added that, because new employees received no insurance benefits during the 5-month eligibility period, Respondent didn't have to pay on them for those 5 months. Hall responded that the employees had voted to retain the Trust Fund health insurance plan. Tandy replied that Respondent continued to desire to offer the Pierce County medical plan as an ''optional plan.'' Hall asked what he meant, and, after Tandy and Herb Gellman began arguing, Hall suggested that Respondent should caucus in order to present an answer to the Union. Hall testified that, after a short break, Gellman stated that ''if we're to go with the Union plan, we want a 50/50 split on the co-payment. If we're going to go with the Pierce County Medical Plan, we want a 50/50 split on employee only coverage.'' Hall replied the Trust Fund would not permit ''selectivity of plans,'' and ''we had to have one plan or the other.'' Believing there was confusion in Respondent's position, Hall asked that Ferryman be present at their next meeting, and ''we can find out really what [he] wants to do'' in order to complete the negotiations. Tandy said he would endeavor to have Ferryman present.

Herb Gellman testified to a different version of the parties' May 1991 bargaining session discussions over health insurance. According to the attorney, Respondent continued to propose the Pierce County health plan as an option for the bargaining unit employees and reiterated its earlier proposals regarding the existing health insurance plan—that it desired a 50/50 split on the monthly premium payments to the Trust Fund and that it would consider going beyond such a split in return for a reduction in the 5-month eligibility period, during which it paid the employee's monthly premium while the employee received no coverage. The union representatives rejected each of the foregoing proposals, and one declared that the parties were ''at impasse'' with regard to health insurance. Gellman further testified that, after a caucus, the Union's representatives asked if, they made ''modifications'' on health insurance, would Respondent be willing to increase wages. Thereupon, the union negotiators stated that the Union would be willing to permit Respondent to enroll all new employees in the Pierce County health plan in return for Respondent's agreement to grandfather all current bargaining unit employees into the existing Trust Fund insurance plan. Respondent's negotiators replied that they believed that, under the existing plan, the total monthly premium for each current employee could reach $165, and wanted to retain the right to either have a cap on the amount of the monthly premium increase or the right to reopen the contract if the health insurance premiums became too costly. Gellman added that, at the close of the bargaining session, three options were on the table—the existing health plan with its initial eligibility period; the Pierce County Health Plan with a 50/50 monthly copayment; and the employee option of either plan with current bargaining unit employees to be grandfathered into the union plan and new employees placed in the Pierce County health plan. With regard to the housekeeping bonus issue, Gellman corroborated Glen Grover that, previously during the negotiations, the parties had agreed that Respondent had been ''misapplying'' the contractual housekeeping provision by paying the bonus after 16 beds rather

[12] There is no evidence as to whether Respondent ever resumed adhering to the admitted past practice.

than rooms and that ''we had reached an accord that when the contract was signed that issue would go back to the way it was originally intended''; however, beyond recalling that the Union raised the issue at the May 1991 bargaining session, he offered no elaboration on the point.

Six days before the above-described May 13, 1991 bargaining session, the Union filed the unfair labor practice charge in Case 19–CA–21491. The charge alleged that Respondent had engaged in certain unlawful unilateral changes in the bargaining unit employees' existing terms and conditions of employment, specifically its failure and refusal to make contributions to the Trust Fund on behalf of new bargaining unit employees since August 1990 and its new calculation method for the payment of the housekeeping bonus. After the investigation disclosed an asserted contractual basis for Respondent's acts and conduct and after obtaining the agreement of the parties, following established procedures, the Regional Director of Region 19 decided to hold the unfair labor practice charge proceeding in abeyance, deferring to the contractual grievance and arbitration procedure for resolution of both matters. In fact, while the parties did proceed to arbitration on the housekeeping bonus issue, inasmuch as the Trust Fund had filed a lawsuit over Respondent's failure to make premium contributions, since August 1990, for new employees, who were all enrolled in the existing health insurance plan, and as the issues were identical to those which would have been placed before an arbitrator, they agreed to have the issues resolved in that proceeding and not to arbitrate the latter matter.

Notwithstanding the lawsuit and the arbitration, Respondent and the Union continued their collective bargaining, arranging for another meeting on June 13 with the understanding that Ferryman would be present. On the scheduled day, the parties met in the Hotel's conference room; representing Respondent was Joseph Brunetti, who had recently been appointed as the Hotel's new general manager,[13] and representing the Union were Hall, Joseph Massimino, the Union's president, and Robert Detamore, a business agent. There is no dispute that the meeting lasted little more than 15 minutes. According to the corroborative accounts of the union representatives, the meeting began with Brunetti requesting permission to tape record the session and Hall refusing to permit him to do so. Massimino asked whether Brunetti possessed authorization to bargain for the Hotel, and Brunetti said that he did. Hall then asked why Ferryman was not present, and Brunetti responded that he was ''detained'' at a Trust Fund audit in Vancouver and that Gellman was in court and would not attend. Thereupon, Hall said that the major issue was health insurance and asked what Brunetti had to say. Brunetti replied that Ferryman indicated that he was going to go with the Pierce County plan and wanted to have a 50/50 split in the monthly premiums. Becoming ''angry'' and interpreting Brunetti's comment as meaning Respondent intended to implement the Pierce County medical plan, Hall accused Brunetti of giving the Union ''kind of a run around'' and committing an unfair labor practice by implementing that health insurance plan and, ''at that point . . . said hey, you know, there's no sense talking anymore. We're tired of this. And Joe Massimino said let's walk. And we left the room.'' Brunetti testified to a different version of what occurred, stating that Hall said he wanted to know one thing—would Ferryman consider grandfathering. Brunetti said, no, and Hall arose, saying, ''I believe we're at an impasse.'' The other union representatives agreed and all left the room.

Whether or not the word was uttered at the bargaining session, it is clear that the Union leadership did, in fact, believe that the negotiations were at an impasse. Thus, later on June 13 after the meeting, not only did the Union distribute a leaflet to bargaining unit employees, which stated ''You have a right to picket your current employer once we have declared impasse in negotiations. At the present time management has proposed numerous takaways and we have no other recourse than to declare an impasse'' but also Rick Hall wrote a letter to Herb Gellman, stating that, pursuant to the terms of article XXII of the collective-bargaining agreement, the Union was declaring ''that we are at impasse in negotiations.''[14] Two weeks later, on June 26, 1991, Hall wrote another letter to Gellman, stating that he understood that Respondent planned to implement changes in the bargaining unit employees' terms and conditions of employment and ''that bargaining reached impasse because of your client's illegal action which clearly impeded bargaining.''[15]

On July 3, 1991, with the bargaining in the above-described posture, the Union filed an unfair labor practice charge in Case 19–CA–21578, alleging that Respondent had refused to bargain in good faith and had engaged in unilateral changes, involving the changing of work schedules. The record discloses that, prior to the filing of the charge, not only had the Union declared an impasse in the negotiations based on Respondent's unlawful activities but also, on June 15, the arbitrator issued his decision, ruling that Respondent had acted in violation of the existing collective-bargaining agreement by changing the method of bonus compensation for housekeeping employees[16] and, on May 26, a United States magistrate judge issued a decision, ruling that, in ceasing to make contributions to the Trust Fund on behalf of new employees from their date of hire, Respondent had engaged in an ''abrupt'' change in practice not justified by any language in the existing collective-bargaining agreement or by

[13] According to Brunetti, he assumed the general manager position in the first week of June and, after moving his family and possessions to Tacoma from Phoenix, Arizona, telephoned the Union in order to seek a postponement of the bargaining session. He spoke to Rick Hall, who refused to postpone the meeting in order to conclude the negotiations.

[14] Asked why the Union declared an impasse, Hall testified, ''we felt we had to declare impasse in writing in order not to be the victim of any kind of litigation, because we were going to carry out a boycott. . . . so we felt that in order to cover ourselves . . . so that we weren't violating the [no strike no lockout clause] . . . we had to declare impasse.'' Hall failed to explain the contradiction between this letter and the Union's leaflet to the employees.

There is no dispute that, pursuant to art. XXII of the existing collective-bargaining agreement, by declaring an impasse in the negotiations, the Union effectively terminated the existing contract, which had been extended on a day-to-day basis while negotiations for a successor agreement continued.

[15] Hall sent the letter to Gellman because ''we did not feel that the employer had a right to implement his last offer or anything else.''

[16] As he believed his authority extended only through the existence of the collective-bargaining agreement, the arbitrator issued a make-whole remedy, effective from March through only June 13, 1991, and not beyond.

past practice. Further, there is no dispute that, in or about July, without notice to the Union or offering it an opportunity to bargain, Respondent commenced registering *all* bargaining unit employees in the Pierce County health plan and, thereafter, failed and refused to make health insurance premium payments, for any bargaining unit employees, to the Trust Fund after investigation of the unfair labor practice charge by Region 19 and, presumably, a finding that such was meritorious, on August 29 and September 4, respectively, Respondent and the Union entered into an informal settlement of the allegations, which was approved by the Regional Director. The settlement agreement, which neither expressly reserves the unfair labor practice charge issues involved in Case 19–CA–21491 nor addresses the matters of Respondent's asserted failure to bargain in good faith or the validity of the union-declared bargaining impasse, remedies two specific unlawful unilateral changes, a change in scheduling procedures and a new training program.

The parties stipulated that, in or about July or August 1992, Respondent distributed a new employee handbook to all bargaining unit employees and that, prior to doing so, Respondent failed to consult with the Union with regard to its contents. As to the reason for the publication of the new handbook, Joseph Brunetti testified that ''I was informed by Choice International Hotels, who we are a franchise of, that they were going to have another inspection, and the inspection calls for the Hotel to have in place a handbook.'' Accordingly, Brunetti began preparing the handbook ''in late June'' and issued it a month or two later. The General Counsel alleges that certain of the terms and conditions of employment, set forth in the handbook, were never contemplated by the parties during negotiations and, therefore, constitute unlawful unilateral changes and that others were discussed during the bargaining but, if, as alleged, the instant bargaining impasse resulted from Respondent's bad-faith bargaining and was, thus, invalid, these likewise constitute unlawful unilateral changes. With regard to the initial allegation, the parties stipulated that the handbook implemented an ''at will'' employment policy, which had never been the subject of negotiations. Also, Rick Hall testified that, while Respondent proposed no change in the grievance and arbitration procedure during bargaining, the handbook sets forth a three step problem review procedure, to resolve ''differences'' over work matters; that the handbook establishes a new cash and charge responsibility policy and a new no-solicitation policy; and that the handbook announces changes, not proposed during bargaining, in the vacation, visitation, and charged leave of absences policies. As to the second allegation, according to Hall, in the handbook, Respondent implemented changes in the overtime and holiday policies—changes consistent with its bargaining proposals to the Union. Conceding that what was announced in the handbook constituted the Hotel's labor relations policy, General Manager Brunetti testified that, while such was a newly implemented practice, the problem review procedure was not intended to replace the contractual grievance and arbitration procedure and was meant to be a lower level problem-solving procedure. He further testified that the change in the vacation policy was implemented inasmuch as there were no 10-year bargaining unit employees; that the new cash and charge policy ''is something that we do and we do not stand by. . . . I don't know that I have ever enforced this paragraph''; and that ''I enforce [the new no-solicitation policy] periodically throughout the week.'' Brunetti also denied that the terms and conditions of employment, set forth in the handbook, were implemented therein—''They were policies that were there prior to the handbook. . . . I just incorporated them into a handbook. So they were past practices that I wrote down so everyone could read them.'' He added that he learned of the past practices from department managers and supervisors at the Hotel. Finally, with regard to the handbook, on or about October 19, Respondent published a memo for bargaining unit employees, informing them that it was in the process of revising the handbook and that the employees should ''disregard the current handbook until we have completed our updated changes.''

B. *Legal Analysis*

Prior to analyzing the merits of the unfair labor practice allegations of the second consolidated complaint, it is essential to discuss the effect of the informal settlement agreement in Case 19–CA–21578 on the allegations, a matter which forms the basis of counsel for Respondent's pretrial Motion for Summary Judgment and one of Respondent's affirmative defenses to the unfair labor practice allegations. In this regard, counsel for Respondent argues that, subsequent to the investigation of the unfair labor charge in Case 19–CA–21578, which alleged that Respondent violated Section 8(a)(1) and (5) of the Act by engaging in bad-faith bargaining and unilateral changes, in late August and early September 1991, the parties entered into an informal settlement agreement of the allegations, which was approved by the Regional Director of Region 19 and with which Respondent fully complied; that the conduct, involved in Cases 19–CA–21491 and 19–CA–21747, occurred from in or about August 1990 through June 1991; and that, as conduct, which antedates a settlement agreement, may not be considered as evidence of unfair labor practices, the allegations of the second consolidated complaint must be dismissed. Both counsel for the General Counsel and counsel for the Trust Fund contend that, in entering into the informal settlement agreement in Case 19–CA–21578, the parties meant to reserve the allegations of Case 19–CA–21491 and that, while settlement agreements may bar prosecution of postsettlement charges filed by other parties, the unique status of fringe benefit funds renders the policy inapplicable in this instance. Board law, with regard to the effect of settlement agreements on presettlement conduct, is both longstanding and stringent—''a settlement, if complied with, will be held to bar subsequent litigation of all prior violations . . . except to the extent they were not known to the General Counsel or readily discoverable by investigation . . . or were specifically reserved from the settlement by the mutual understanding of the parties.'' *Hollywood Roosevelt Hotel Co*., 235 NLRB 1397 (1978); *Steves Sash & Door Co*., 164 NLRB 468, 473 (1967). As to whether evidence of prior violations was ''known'' to the General Counsel, the applicable test is whether such ''was or should have been discovered through a proper investigation.'' *Hatfield Trucking Service*, 270 NLRB 136, 137 (1984). Moreover, the Board requires that ''proof that a charge has been specifically reserved from a settlement agreement must be established by affirmative evidence,'' and the fact that a charge is not listed in the settlement agreement does not constitute specific reservation. *E.S.I. Meats*, 270 NLRB 1430, 1431 fn.

3 (1984). Finally, ''if, after settlement of one charge, a related charge regarding pre-settlement conduct is filed, litigation of the new charge is barred *whether the same or a different party filed the new charge*.'' *E.S.I. Meats*, supra at 1431 (emphasis added).

Applying the foregoing principles to the instant matter, I find merit in counsel for Respondent's Motion for Summary Judgment and corresponding affirmative defense, noting, at the outset, that, as counsel points out, all of the events, which underlie the second consolidated complaint's unfair labor practice allegations and the unfair labor practice charges in Cases 19–CA–21491 and 19–CA–21747,[17] occurred prior to the Union's filing of the unfair labor practice charge in Case 19–CA–21578, which alleges that Respondent had failed to bargain in good faith and had engaged in unlawful unilateral changes, and the Regional Director's approval of the informal settlement agreement therein. In these circumstances, I believe, it is clear that the settlement agreement precludes resolution of the allegations of the unfair labor practice charge in Case 19–CA–21491, filed by the Union. Thus, there was no specific reservation of the allegations of the latter unfair labor practice charge set forth in the informal settlement agreement in Case 19–CA–21578, and there exists no affirmative record evidence that the parties intended to do so. Both counsel for the General Counsel and counsel for the Trust Fund seek that I draw certain inferences, from the record and the language of the settlement agreement, establishing that the parties' intent was to reserve Case 19–CA–21491; however, in my view, such would only lead to undue speculation and I shall decline to do so. As did the trial examiner in *Steves Sash & Door Co*., supra, counsel for the Trust Fund infers, from the wording of the settlement agreement, from the absence of any mention of Case 19–CA–21491, and from the lack of a provision, withdrawing all pending charges, that the parties intended to reserve the unfair labor practice charge for future litigation. Contrary to counsel, buttressing my view that acceptance of counsels' contention would lead to undue speculation, inasmuch as Respondent and the Union voluntarily agreed to arbitrate the housekeeping bonus issue and to permit the health insurance premium payment issue be decided in the Trust Fund's lawsuit to compel Respondent to make the payments, as both matters had been decided prior to execution of the settlement agreement, and as there is no record evidence that Respondent would not comply with both adverse decisions, one may just as reasonably infer that the parties believed that Case 19–CA–21491 had been resolved and that the parties did not intend to reserve the matter. Moreover, as stated above, the Board has consistently rejected, as speculation, the contention that acts ''of omission may constitute specific reservation.'' *E.S.I. Meats*, supra at 1431 fn. 3; *Cambridge Taxi Co*., 260 NLRB 931 (1982). In these circumstances, absent clear, affirmative evidence, I reiterate that one can only speculate as to what the parties intended, and, therefore, I see no reason to depart from the clear Board policy, regarding the litigation of presettlement agreement conduct. Accordingly, given that the unfair labor practice charge in Case 19–CA–21491 involves presettlement conduct, I find that the settlement agreement in Case 19–CA–21578 precludes resolution of the issues raised by the former matter.

Turning to consideration of the effect of the settlement agreement in Case 19–CA–21578 on the presettlement agreement conduct encompassed by the subsequent unfair labor practice charge in Case 19–CA–21747, it is readily apparent that, having successfully pursued a lawsuit against Respondent for collection of the health insurance premium payments for all new employees, which were withheld by Respondent since August 1990, the Trust Fund's purpose in filing the unfair labor practice charge, in Case 19–CA–21747, was to collect the health insurance premium payments, allegedly unlawfully withheld by Respondent since it commenced covering all bargaining unit employees under the Pierce County medical plan. In this regard, I note that, in order to establish a violation of Section 8(a)(1) and (5) of the Act based on the conduct, the General Counsel initially must establish that the union-declared impasse on June 13 was invalid, having been caused by Respondent's bad-faith bargaining, which resulted from its allegedly unlawful unilateral changes. However, all the matters, which are raised by the charge in Case 19–CA–21747, alleged as unfair labor practices in the second consolidated complaint, and necessary to establish Respondent's bad-faith bargaining, were certainly discernible by the General Counsel during the investigation of the Union's unfair labor practice charge, in Case 19–CA–21578. Thus, just 1 week before the filing of the charge, Rick Hall had wrote to Respondent's attorney, Gellman, challenging the bargaining impasse as resulting from Respondent's ''illegal action.'' Further, one aspect of the Union's unfair labor practice allegations concerned Respondent's bad-faith bargaining resulting from alleged unilateral changes. Therefore, the validity of the impasse certainly should have been the subject of a ''proper investigation,'' by Region 19, of the Union's charge, and, in the above-described circumstances, it is utterly inconceivable to me how the Regional Director could have failed to have considered the issue. *Hatfield Trucking Service*, 270 NLRB 136, 137 (1984).

[17] While the unfair labor practice charge in Case 19–CA–21491, filed by the Union, concerned only Respondent's allegedly unlawful unilateral change in the calculation of the housekeeping bonus and its unilateral failure and refusal to remit to the Trust Fund immediate health insurance premium payments for bargaining unit employees who were employed fewer than 5 months, the unfair labor practice charge in Case 19–CA–21747, filed by the Trust Fund, encompasses all of Respondent's preimpasse allegedly unlawful unilateral changes, including the above acts, Respondent's alleged bargaining in bad faith, and the validity of the union-declared bargaining impasse. Thus, while the Sec. 10(b) of the Act 6-month statute of limitations period for the latter charge encompasses Respondent's acts and conduct since April 16, 1991, and while Respondent commenced withholding premium payments for new bargaining unit employees in August 1990, the practice continued through June 1991. The Board has long held that each allegedly unlawful failure to make a trust fund payment constitutes a ''separate and distinct violation of the Act,'' and failures within the 10(b) period may be litigated notwithstanding that the practice had been ongoing more than 6 months from the filing of the charge. *A & L Underground*, 302 NLRB 467, 469 (1991); *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980). In these circumstances, the Trust Fund's unilateral change allegation encompasses Respondent's failure to remit premium payments. Moreover, inasmuch as accountant Winter was inexact as to when, in late March, Respondent commenced its change in calculating the housekeeping bonus, it can not be said to have commenced outside the statute of limitations period and, therefore, I likewise find that this allegedly unlawful change may by encompassed by the unfair labor practice charge in Case 19–CA–21747.

While recognizing that the Board holds that, notwithstanding that a subsequent charge is filed by a different charging party, a settlement agreement disposes of all issues involving presettlement conduct, counsel for the General Counsel and counsel for the Trust Fund, in support of their contention that the settlement agreement, in Case 19–CA–21578, does not bar my consideration of the presettlement agreement conduct, which is the subject of Case 19–CA–21747, argue that the Trust Fund and the Union have divergent duties and responsibilities, that the only interest of the Trust Fund herein is the collection of delinquent contributions, that the Trust Fund has no other forum in which to proceed, and that, therefore, the Trust Fund enjoys some sort of special status and the Board's normal settlement agreement policy is ''misapplied'' as to trust funds. While the arguments of counsel are compelling and notwithstanding that, pursuant to the Supreme Court's decision in *Laborers Health & Welfare Fund for Northern California v. Advanced Lightweight Concrete Co*., 484 U.S. 539 (1988), the Board is the only forum before which the Trust Fund may pursue the collection of postcontractual delinquent contributions, I note that the Board has not yet granted to fringe benefit trust funds any sort of special status, exempting such entities from its aforementioned policy, regarding the subsequent litigation of presettlement conduct. Unless and until the Board so acts, I must reject the arguments of counsel and find that the Trust Fund stands on no different footing than any other charging party in similar circumstances.[18]

Accordingly, as recognized by counsel for the General Counsel, the ''linchpin'' of the unfair labor practice charge, filed by the Trust Fund, involves presettlement agreement conduct, which should have been discovered by the General Counsel during the investigation of Case 19–CA–21578. Therefore, that a different charging party filed the subsequent unfair labor practice charge is an irrelevant consideration, and ''the issue is not whether the new charge was filed by a different charging party, but whether the matters raised by the new charge were reasonably discernible through investigation. *E.S.I. Meats*, supra; *Hatfield Trucking Service*, supra. Noting the availability of the evidence relating to the allegedly unlawful unilateral changes, which, in the view of the General Counsel, comprises the evidence bearing on Respondent's asserted bad-faith bargaining, and to the validity of the union-declared impasse at the time of the filing of the unfair labor practice charge in Case 19–CA–21578, I conclude that the General Counsel must be barred from litigating the presettlement unilateral change and bad-faith bargaining issues and recommend dismissal of paragraphs 5(a) through (c), 5(e), 6, and 7 of the second consolidated complaint. Further, inasmuch as the issue of whether Respondent failed to bargain in good faith so as to render the June 13, 1991 union-declared bargaining impasse invalid may not be litigated in this proceeding and as it appears that the implemented health insurance plan is that which was offered to the Union during bargaining, there can be no contention that Respondent unlawfully implemented a new health insurance plan for bargaining unit employees after the union-declared impasse. Therefore, I shall likewise recommend dismissal of paragraph 5(d) of the second consolidated complaint.

With regard to paragraph 5(f) of the second consolidated complaint, the allegations pertaining to implementation of the various employee handbook provisions in July or August 1992, inasmuch as the General Counsel is barred from litigating the validity of the union-declared bargaining impasse of June 1991 and as it is conceded that certain of the implemented provisions of the handbook were consistent with that which was offered to the Union during the course of the bargaining and prior to the impasse, I shall recommend dismissal of paragraphs 5(f)(ii) and 5(f)(iv) of the second consolidated complaint. As to other provisions of the employee handbook, the parties stipulated that the ''at will'' employment policy was new and never the subject of negotiations; General Manager Brunetti conceded that the problem review procedure, the vacation, cash and charge, and the no-solicitation policies were new and never proposed or discussed during the bargaining; and Rick Hall testified, without contradiction, that the handbook announced new visitation and leaves of absence policies, which had never been discussed during the bargaining. The Board has long held that, after an impasse in bargaining, an employer may only implement new terms and conditions of employment, which are consistent with its last offer to a union during bargaining. *Fire Fighters*, 304 NLRB 401, 402 (1991); *Storer Communications*, 294 NLRB 1056 (1989). While counsel for Respondent asserts that none of the above changes in the bargaining unit employees' terms and conditions of employment had ever been implemented, General Manager Brunetti admitted that the new no-solicitation policy had been regularly enforced at the Hotel and that, when distributed to employees, the provisions of the handbook constituted Respondent's labor relations policy. While the handbook may have been rescinded in October 1992, it is clear that provisions had been implemented and that employees were told to disregard the handbook only after the filing of the unfair labor practice charge in Case 19–CA–22298. In these circumstances, *88 Transit Lines*, 300 NLRB 177 (1990), is in apposite, and, as the foregoing handbook provisions do not correspond to what was offered to the Union prior to the bargaining impasse, Respondent's implementation of these, in the handbook, was violative of Section 8(a)(1) and (5) of the Act. *Fire Fighters*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been the exclusive representative for purposes of collective bargaining of the following appropriate unit: all food and beverage employees, kitchen employees and hotel service employees employed by Respondent at the Hotel; excluding all other employees, supervisors, and guards as defined by the Act.

4. Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act by unilaterally, without notice to or offering the Union an opportunity to bargain, in or about July or August 1992, implementing changes, set forth in an employee handbook, in the aforementioned bargaining unit employees' terms and conditions of employment, not encom-

[18] Of course, if a bargaining unit employee had filed the unfair labor practice charge in Case 19–CA–21747, no complaint would ever have issued. If the General Counsel and the Trust Fund wish to challenge the Board's policy in this area of the law, their contentions are best addressed to the Board or any reviewing courts.

passed by preimpasse bargaining proposals, including new ''at will'' employment, problem review, no-solicitation, visitation, cash and charge, and leaves of absence policies and a revised vacation policy.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Unless specifically found above, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist from such conduct and to take certain affirmative action necessary to effectuate the purposes and policies of the Act. With regard to the new ''at will'' employment, problem review, cash and charge, no-solicitation, visitation, and leaves of absence policies implemented in the employee handbook published in July or August 1992, I shall recommend that, to the extent that it has not already done so, Respondent be ordered to cease and desist from enforcing the policies. With regard to the changed vacation policy, I shall recommend that Respondent be ordered to restore the practice to that which existed prior to the publication of the aforementioned employee handbook; to not implement such a change in the bargaining unit employees' terms and conditions of employment until, after the Union declines to bargain or after Respondent bargains in good faith, the Union agrees to the changes or an impasse in the bargaining occurs; and to make whole employees for all losses sustained from the change plus interest. Such sums shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest paid in accordance with the formula set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record herein, I make the following recommended[19]

ORDER

The Respondent, Ferryman Enterprises d/b/a Quality Hotel Tacoma Dome, Tacoma, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without notice to or offering the Union an opportunity to bargain, implementing changes in the bargaining unit employees' terms and conditions of employment, which were not encompassed by preimpasse bargaining proposals, including new ''at will'' employment, problem review, no-solicitation, visitation, cash and charge, and leaves of absence policies and a revised vacation policy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the polices of the Act.

(a) Restore the vacation policy for all food and beverage employees, kitchen employees, and hotel service employees to that which existed prior to the publication of the employee handbook in July or August 1992, make whole employees for any losses they suffered as a result of the unlawful unilateral change in that practice in the manner set forth in the remedy section of this decision, and maintain the policy in effect until after the Union declines to bargain or, after it bargains in good faith, the Union agrees or another impasse in bargaining occurs.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay, if any, due under the terms of this Order.

(c) Post at its Tacoma, Washington hotel and restaurant facility copies of the attached notice, marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director of Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order of what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that, insofar as the second consolidated complaint alleges that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act by engaging in unilateral changes and bad-faith bargaining prior to June 13, 1991, by unilaterally implementing a health insurance plan for bargaining unit employees, and by engaging in certain unilateral changes in June 1992, the second consolidated complaint is hereby dismissed.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated the National Labor Relations Act and has ordered us to post and abide by the terms of this notice.

WE WILL NOT, unilaterally, without affording Hotel and Restaurant Employees, Local 8, Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union) an opportunity to bargain, implement changes in our food and beverage employees', kitchen employees', and hotel service employees' terms and conditions of employment, which were not encompassed by our bargaining proposals

made to the Union before it declared an impasse in bargaining on June 13, 1991, including new ''at will'' employment, problem review, no-solicitation, visitation, cash and charge, and leaves of absence policies and a revised vacation policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL restore the vacation policy of all of our above-mentioned employees to that which existed in June 1992 and make whole, with interest, any employees who suffered losses as a result of our unlawful unilateral change of that policy, and WE WILL implement no changes in the policy until after the Union declines to bargain or after we bargain in good faith and the Union agrees or another impasse in bargaining occurs.

FERRYMAN ENTERPRISES D/B/A QUALITY HOTEL TACOMA DOME